Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

October Term, 2000

JOHN R. CONNOR,

*Petitioner,*

*v.*

LUCAS E. PHILLIPS, JR., ESQ., ADMINISTRATOR, C.T.A. ESTATE OF MARY A. CONNOR,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether an Exceptant to a fiduciary's final accounting in probate in New Jersey has a due process right under the Fourteenth Amendment to the United States Constitution to examine the fiduciary under oath and take discovery on his exceptions?

## PARTIES TO THE PROCEEDING

JOHN R. CONNOR, Petitioner *Pro se*

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IN THE

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OCTOBER TERM, 2000

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In the Matter of,

JOHN R. CONNOR,

Petitioner,

vs.

LUCAS E. PHILLIPS, JR., ESQ.,
ADMINISTRATOR, C.T.A.,
ESTATE OF MARY A. CONNOR,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

---

## PETITION FOR WRIT OF CERTIORARI

John R. Connor, Petitioner pro se, respectfully petitions the United States Supreme Court for a writ of certiorari to review the Final Order of the New Jersey Supreme Court, entered in this matter on January 24, 2001, which dismissed petitioner's appeal from a judgment of the Appellate Division of the Superior Court of New Jersey, and its Order, entered March 8, 2001, denying reconsideration.

## JURISDICTION

On January 24, 2001, the New Jersey Supreme Court entered an order dismissing Petitioner's appeal *as of right* in this matter, on the ground that the matter did not present a "substantial constitutional question within the meaning of the Rule [2:2-1(a)(1)] or applicable case law..." (Appendix A, p.1a). On March 8, 2001, the New Jersey Supreme Court entered a second order denying Petitioner's motion for reconsideration. (Appendix B, p. 2a). Petitioner had appealed from a judgment of the Appellate Division of the Superior Court of New Jersey, entered April 26, 1999 (Appendix D, pp. 5-6a), affirming a November 5, 1997 judgment of the Superior Court of New Jersey, Chancery Division, Probate Part, which allowed the Final Account of the Administrator, C.T.A. in the Estate of Mary A. Connor. (Appendix E, p. 7-11a).

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(a).

The sole opinion entered in this matter is that of the Appellate Division of the Superior Court of New Jersey, filed April 26, 1999, which is attached herewith. (Appendix D, p. 5-6a). The opinion is unpublished.

## CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state * * * shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New Jersey Constitution (1947) , Article 6, Section 5, Paragraph 1, provides in pertinent part:

> 1. Appeals may be taken to the Supreme Court:
>  (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State. . .

N.J.S.A 3:9-7 reads in pertinent part:

> On exceptions to an account of a fiduciary, the court of any party interested therein, may examine the accountant, on oath, concerning the truth or fairness of the account.

N.J.S.A. 3B:17-6 reads in pertinent part:

> On exceptions to an account of a fiduciary, the court or any party interested therein, may examine the accountant, on oath, concerning the truth and fairness of the account.

R.S. 3:10-16 reads in pertinent part:

> If a person interested in the settlement of the account of a fiduciary *** excepts thereto, the court shall hear the proofs and allegations at a time appointed *** The court to which an account is reported for allowance *** may, at the instance of a party interested therein or by their own proper authority, examine the account, on oath, concerning the truth and fairness of the account.

N.J.Sup.Ct. *C.P.R. 2:2-1(a)(1)* provides in pertinent part:

> Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State. . .

N.J.Sup.Ct. *C.P.R. 4:10-2(a)* provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . .

## STATEMENT OF THE CASE

By judgment dated December 3, 1979, filed in the Superior Court of New Jersey, Chancery Division, Essex County, New Jersey, Lucas E. Phillips, Jr., Esq. was appointed Administrator, C.T.A. of the Estate of Mary A. Connor. (Mr. Phillips was substituted for a previous court-appointed administrator, Mr.

George Warren, Esq. who had resigned). That judgment, which probated the will of decedent, also prohibited Petitioner from serving as executor of his mother's estate, although he was designated executor in the will. (Appendix J, p. 23a).

The principal cash asset in decedent's estate was a trust fund held by the Clerk of the Superior Court, which resulted from certain equity litigation, involving a family tavern business, decedent Mary A. Connor had been conducting prior to her death in 1977. (For purposes of this petition, that litigation is styled as: Connor v. Flynn, Docket Nos. C-2565-68/A-2853-74). The part of the trust fund belonging to decedent originally, in 1972, when it was established, amounted to $35,546.20, however, by 1997, when the Administrator C.T.A. filed his accounting, it totalled $58,428.02.

Prior to her death, decedent, appearing pro se, but represented (with the court's permission), by petitioner, had prevailed in an appeal in the Appellate Division, entitled Connor v. Flynn, A-898-75, which reversed and remanded an earlier, 1975, trial court decision which had awarded $28,657.94 in attorneys' fees for liens asserted against that trust fund.

The second, remand hearing on attorneys' lien claims on decedent's trust fund asset did not occur until November 16, 1983, nearly six years after decedent's death on November 24, 1977. The hearing was predicated on a 3-page Certification of the Administrator, C.T.A., dated December 21, 1981, which stated: "[a]s Administrator, C.T.A., I wish to collect said funds on deposit with the Clerk of the Superior Court in order to satisfy the obligations of the Estate of Mary A. Connor *** In particular, it is my intention to pay the following debts immediately upon the release of said funds..." The schedule of "debts"had now increased to $37,690.33, excluding interest,

representing attorneys' lien claims against the trust fund, including $6,094.76 to be paid to the first administrator, George Warren, Esq.

The November 16, 1983 hearing on the Administrator C.T.A.'s certification was conducted by the Chancery Division –however, not by its Probate Part in the Estate of Mary A. Connor, but in the decedent's civil litigation of Connor v. Flynn, which had been bequeathed to petitioner. (Appendix J, p. 22a) Petitioner appeared at the hearing to argue for a stay. However, the court would not accord petitioner the status of a party, but merely that of a "legatee" (Appendix M, p. 30a). Absent party status, petitioner refused to participate in the hearing and departed the courtroom. During that hearing, neither the Administrator C.T.A. Lucas E. Phillips, Jr., Esq., nor his attorney, John H. Watson, Jr., Esq., conducted any cross-examination of the attorney-witnesses. (Appendix M, pp 29-34a). No defenses were asserted. No contracts were inquired after, although two of the attorneys had contracts with decedent. The end result was not a judgment, but an Order of Disbursement, dated February 29, 1984, directing payment of $49,998.04 in attorneys' fee claims out of the trust fund. An additional order, entered August 5, 1985, awarded $1,016.96 in additional interest to one claimant (Blackwell), for a grand total of $51,015.00 paid out of decedent's trust fund, without contest.

Petitioner appealed the February 29, 1984 order of disbursement to the Appellate Division. Connor v. Flynn, Docket No. A-3187-83T3. Specifically, petitioner challenged the order on the ground, inter alia, that the trial court lacked jurisdiction because it had conducted a probate proceeding with the civil litigation of Connor v. Flynn, which had been bequeathed to petitioner, who was not allowed to become a party. In an unpublished per curiam opinion, filed May 30, 1985, the

Appellate Division found that "[p]robate proceedings [were] not even remotely involved in the two proceedings below." (Appendix L, pp. 28a).

On November 21, 1979, petitioner filed a complaint in the matter of the death of his mother, Mary A. Connor, under the state's Wrongful Death Statute, against the physicians and hospital. Connor v. Sachs, Docket No. L-14573-79. The suit was filed in the Law Division of the Superior Court of New Jersey, Union County. The filing by petitioner was necessary because the previous administrator (George Warren, Esq.) had refused to file the suit. The litigation never reached the merits, but evolved into an attempt by petitioner to secure letters ad prosequendum in order to prosecute the suit, which was twice before the U. S. Supreme Court, which finally denied certification on November 27, 1989. The wrongful death suit lasted 10 years, during which time several pleadings were sent by petitioner to the administrator, C.T.A., who had ample opportunity to intervene in the suit. The Administrator, C.T.A. never, at any time, responded to the pleadings, or in any way attempted to intervene, although, under New Jersey's Wrongful Death Statute, only he possessed the requisite standing to prosecute the action.

The matter of the wrongful death suit might have simply succumbed to history, but for the fact that, in 1994, petitioner received notification that his mother, Mary A. Connor, was a potential plaintiff in a class action suit dealing with defective cardiac pacemakers entitled: In re Cordis Corporation Pacemaker Product Liability Litigation, Civil Cases Nos. C-3-86-543 and C-3-90-374 in S.D. Ohio. It developed that decedent had, in fact, been a recipient of a defective Cordis pacemaker model. Over the next two years, petitioner worked with the San Francisco law firm of Lieff, Cabraser, Heiman & Bernstein to

establish decedent's medical history and provided the information and medical records necessary to protect and prosecute her interest in that suit.

On October 6, 1995, the district court approved a settlement agreement in the Cordis case, amounting to $21,534,274.81. However, due to the large size of the plaintiff class, decedent's share of the proceeds amounted to $3,359.42, which was paid by a check made payable to the Estate of Mary A. Connor and mailed to petitioner.

Petitioner's numerous attempts, as well as those of the firm of Lieff, Cabraser, to get the Administrator, C.T.A. to accept and deposit the check to the estate checking account are amply documented in the Affidavit of James M. Finberg, Esq. (Appendix H, pp. 16-19a). Ultimately, petitioner was forced to secure a court order to get the Cordis proceeds check deposited. The monies were almost lost to charity because of the refusal of the Administrator C.T.A. to deposit the check. (Appendix I, p. 20a).

********

The hearing on the Administrator C.T.A.'s Final Account commenced on September 12, 1997 before the Honorable Rosemary Higgins Cass, J.S.C., in the Superior Court of New Jersey, Chancery Division, Probate Part (Essex County).

Exceptant's first three procedural exceptions (1- lack of jurisdiction; 2- insufficiency of process; and 3- insufficiency of service of process) were denied by the court and are not a part of the within petition. However, at the point when the court took up petitioner's Exceptions IV - VIII, which dealt with petitioner's objections and requests for surcharges in connec-

tion with payments to certain attorneys from the estate trust fund (the payments were made as a result of two orders of disbursement secured by the Administrator C.T.A. in 1984 and 1985), petitioner advised the court of his intention to take discovery on the matter:

> MR. CONNOR: I think I have to do it at this point, but I understand–well, under [civil] practice [R]ule [] [4:10] in particular, I am entitled to take discovery on the remaining exceptions which deal with surcharge, and I move that the Court enter a scheduling order, setting at time for a hearing on the [exceptions], after I have had the opportunity to take a certain amount of discovery on the exceptions.

(September 12, 1997 Transcript I, p.32, 4-6).

The court initially stated that the Administrator C.T.A. could "[]not be surcharged for making payments in accordance with an order of the Superior Court, Chancery Division, Probate Part, which was entered thirteen years ago." (Id., p. 33, 8-10). Petitioner, however, forestalled an immediate ruling on the issue by arguing that he was not trying to reopen the two disbursement orders per se, but was attempting to establish that the Administrator C.T.A.'s conduct in not defending the estate against the attorney fee requests constituted a breach of his fiduciary duty for which he could be surcharged.

The Administrator C.T.A. responded that "Mr. Connor wishes to relitigate the [liens] issue." (Id., p. 36). However, petitioner pointed out to the court that he was "not attempting to re-open the orders of disbursement. I am attempting, this is the first time that I have had the opportunity on an exception to challenge and examine Mr. Phillips as to why he didn't

defend the estate, and if he didn't * * * he thereby breached his fiduciary duty and has to be held accountable." (Id., 37, 10-16).

Following this argument, the court deferred its ruling on petitioner's request for discovery on the exceptions and surcharges:

> "THE COURT: * * * I will not rule today on whether you will be entitled to discovery. I would like to review both the order and the transcript of the [liens] hearing, and if you have anything else that you think would be pertinent to that issue or you, Mr. Phillips..."

(Id., 42, 18-21). Further, "I will have to wait until I see the order of Judge Thompson and the transcript from that hearing insofar as whether there is any necessity to depose Mr. Phillips, and a possible surcharge." (Id., 54-24 to 55-2).

On Exception IX, the court sustained Petitioner's objection to the Administrator C.T.A.'s proposed distribution of $5,914.80 to a group of "contingent" beneficiaries (Appendix E, p. 9a) who did not take under Art. IV(b) and (c) of decedent's will, since Mary A. Connor had predeceased her husband by 14 years. The distribution would have been at petitioner's expense because it was in lieu of payment of the specific bequest contained in Art. II, whereby the ($6,408.80) "proceeds of the judgment in * * * Connor v. Flynn, Docket No. A-2853-74 [were bequeathed to Petitioner] John R. Connor, absolutely and forever." (Appendix J, p. 22a). Excluding interest, the proceeds of the judgment amounted to $6,408.80.

On Exception X, the court allowed petitioner's objection to the omission of decedent's funeral bill and ordered the Administrator C.T.A. to pay $3,035.10 to petitioner as "a creditor with a claim of first priority under N.J.S.A. 3B:22(a)." (Appendix E, p. 9a).

With respect to Exception XI, petitioner objected to the payment of $2,971.51 in corpus commissions and $2,500.00 in attorneys' fees for several reasons, principally: that the Administrator C.T.A. had, by not defending against the liens, not only breached his fiduciary duty to this estate, and its beneficiaries, but also had defrauded this estate of its principal (trust fund) asset. Petitioner also objected, inter alia, that the administrator should be surcharged for his failure to intervene in decedent's wrongful death suit, denominated Connor v. Sachs, which the subsequent Cordis litigation demonstrates was a meritorious action. The court overruled the exception.

As to the Twelfth Exception, that a "fraudulent predicate" underlies the Administrator C.T.A.'s appointment because of a "falsely erroneous" Appellate Division in the 1980 appeal of his appointment, Estate of Mary A. Connor, Docket No. A-1889-79, the court overruled same because it was not going to "second-guess[] the appellate division..." (September 12, 1997 Transcript, 58, 12-13).

Prior to the continued hearing, Exceptant provided the court with a copy of the November 16,1983 liens hearing transcript and the resulting two orders of disbursement. Petitioner also served the Administrator, C.T.A., with a set of document requests under R. 4:10-2.

At the continued hearing on September 26, 1997, the court took up what it described as Petitioner's "requesting discovery

pursuant to Rule 4:10-2 regarding matters not privileged, *which would be relevant to the subject matter involved in the* pending action..." (September 26, 1997 Transcript II p. 8, 1-3). The court's response was to read at length from the 1983 liens hearing transcript, which was neither marked for identification nor offered into evidence, emphasizing the "length-of-time" factor (20 years) from earlier events as a basis for denying discovery on the liens issue.

> "THE COURT: Well, Mr. Connor, I've considered your application. I absolutely see no bad faith on Mr. Phillips' part as administrator CTA. He didn't procure the judgments, as such. These attorneys were seeking the judgments [sic], the liens that they wanted in this matter. (Emphasis added)
>
> MR. CONNOR: I have not examined him under oath, which is my right.
>
> THE COURT: And you are not going to.
>
> MR. CONNOR: Oh, Your Honor.
>
> THE COURT: That may –
>
> MR. CONNOR: That is my right as an exceptant to put him on–
>
> THE COURT: No.
>
> MR. CONNOR: – the stand. That's reversible error.

> THE COURT: Well, it may well be and you have your right to appeal my decision, but I am not going to allow 20 years after these initial cross-litigation nor after your mother's death, 20 years after, that the administrator CTA be surcharged because he didn't fight against the liens -"

(September 26, 1997 Transcript II, 20-11 to 21-4; Appendix N, p. 36-37a). (Emphasis added).

However, the court was curious on the issue of fraudulent procurement:

> "THE COURT: I asked you who do you think fraudulently obtained the judgment [sic]?
>
> MR. CONNOR: Well, I would submit that Mr. Phillips and [his attorney] Mr. Watson and certainly the attorneys who submitted bills in [excess] of their contracts."

(Id., 27, 14-18; Appendix N, pp. 37a).

To petitioner's argument that this was his "first opportunity to go at Mr. Phillips. I have never done this before..." (Appendix N, p. 38a), the court stated:

> "THE COURT: You had an opportunity at the hearing before Judge Thompson to question, because he was allowing you to be present. You choose [sic] to then absent yourself...

********

> THE COURT: Excuse me. You had an opportunity, in fact, Judge Thompson insisted that you be there. He thought as a legatee you had an absolute right to be there for that hearing."

(Appendix N, p. 38a). (Emphasis added). Following petitioner's on-the-record discussion of the case of Hurlbut v. Hutton, 44 N.J. Eq. 302 (Ch. 1888), which decision allows an exceptant to accept a judgment while simultaneously alleging fraudulent procurement, petitioner stated that he thought "the Court [was] confusing the validity of the judgment, which I'm accepting, with the manner in which they were procured by this administrator and his attorney. They are two entirely different issues. And the Hurlbeit [sic] case clearly delineates those issues." (Appendix N, pp. 39a). The Administrator C.T.A., on the other hand, persisted in objecting that petitioner was merely "attempt[ing] to re-litigate [liens] issues that have been litigated..." (Appendix N,p. 39a).

In the end, the court not only refused to permit discovery to take place, but also denied petitioner the right to examine the Administrator C.T.A. under oath:

> "THE COURT: * * * I am further denying the opportunity to Mr. Connor at this late stage to cross-examine the administrator CTA in reference to those much, much earlier determinations that is by final order of Judge Thompson, February 28 or 29 – 29, 1984.

(September 26, 1997 Transcript II, 42, 14-18). (Emphasis added).

Then, without any "under oath" examination of the Administrator C.T.A. on his Final Account, the court allowed: a

commission of $2,971.51 to the administrator (Id., 36, 20-21); a $1,000.00 attorney's fee to John H. Watson, Jr., Esq. (Id., 37, 10-11); and a $1,500.00 attorney's fee to the Administrator, C.T.A. (Id., 38, 1-5).

********

## CERTIFICATION

John R. Connor, Petitioner pro se, hereby states that:

1. I am the petitioner in the within Petition for Certification, being filed in the United States Supreme Court on June 6, 2001.

2. I hereby certify that the facts contained in the foregoing Statement of the Case are true, to the best of my knowledge. I am aware that if any of the foregoing statements is wilfully false, then I am subject to punishment, as prescribed by law.

/s/ John R. Connor

John R. Connor, Pro se

## REASONS FOR GRANTING THE WRIT

### I. The decision of the New Jersey Supreme Court that petitioner's appeal did not present a "substantial constitutional question" is erroneous as a matter of law.

By its order, filed January 24, 2001, the New Jersey Supreme Court dismissed the within appeal, taken under R. 2:2-1(a), on the ground that "the matter does not present a substantial constitutional question within the meaning of the Rule or applicable case law. . ." (Appendix A, infra, p. 1a).

Not included in the state supreme court's order of dismissal is its customary citation to "applicable case law" on the issue of what constitutes a "substantial" constitutional question. Those cases, heretofore cited by the court in previous orders, are: Tidewater Oil Co. v. Mayor and Council of Cartaret, 44 N.J. 338 (1965); In re: East Windsor Mun. Util. Auth. v. Shapiro, 57 N.J. 168 (1970); Deerfield Estates, Inc. v. Tp. Of East Brunswick, 60 N.J. 115 (1972); and Piscataway Assoc., Inc. v. Township of Piscataway, 73 N.J. 546 (1977).

It is Petitioner's position, hereafter presented, that these controlling decisions not only support his argument that the constitutional issue in this case is "substantial" but also that the New Jersey Supreme Court possesses the alternative remedy, which should be exercised in this case of granting certification nunc pro tunc. For the purpose of petitioner's state supreme court appeal, filed in the New Jersey Supreme Court, the constitutional question, (also raised in the Appellate Division) in its final form, read:

> Whether the refusal of a probate judge to allow an Exceptant to examine a fiduciary, under oath on his

> account and exceptions thereto, seeking to surcharge the accountant, violated Exceptant's due process rights under N.J.S.A. 3B:17-6, and the Fourteenth Amendment to the United States Constitution?

In connection with his state appeal, Petitioner diligently researched the case annotations for N.J.S.A. 3B:17-6. None of the cases cited raised a due process issue in connection with this statute. Hence, the question presented in the appeal was one of first impression. The New Jersey Supreme Court has well-established criteria for evaluating whether a presented constitutional question is "substantial" under the 1947 New Jersey Constitution.

One of the leading cases, Tidewater Oil Co. v. Mayor and Council of Cartaret, 44 N.J. 358 (1965), involved a challenge to the constitutionality of certain provisions in a zoning ordinance which forbade plaintiff oil company from erecting and operating a tank farm in a certain zone. Plaintiffs, successful at trial, were reversed on appeal to the Appellate Division of the Superior Court of New Jersey, subsequently appealing to the state supreme court "as of right" under N.J. Const. Art. VI, sec. V, par. 1(a) (1947). The court determined that, although the appeal did not present a substantial constitutional question, nevertheless, "we feel we should determine the case on the merits since the dimensions of 'causes * * * involving a question arising under the Constitution' have not been fully clear." Id., at 344.

In its opinion, the court refined the criteria for a second appeal "as of right":

> The exception of additional review in cases involving constitutional questions has to be based on the

> thinking that matters of interpretation or application of the organic documents of government and of fundamental rights and obligations warrant a second judicial look if the losing party wants it because they are intrinsically of basic importance.

Id., at 341. (Emphasis added). Further, constitutional questions must be " 'substantial,' Starego v. Soboliski, 11 N.J. 29, 32 (1952) * * * and not 'merely colorable,' State v. Pometti, 12 N.J. 446, 450 (1953)." Id., at 342. Additionally, "there must appear indication of true merit from the constitutional point of view, i.e., that the issue tendered is not frivolous and has not already been the subject of a conclusive judicial determination." Id., at 342. (Emphasis added).

In Tidewater, supra, the court was of the opinion that, due to the "relatively advanced stage of the law of land use regulation, it will be the rare case * * * which will present an issue of sufficient constitutional involvement for purposes of the double appeal provision." Id., at 343. Nevertheless, notwithstanding the absence of a substantial constitutional question, the court reviewed the case on the merits.

In In re: East Windsor Mun. Util. Auth. v. Shapiro, 57 N.J. 168 (1970), involving a condemnation easement proceeding, the defendant filed a second appeal with the New Jersey Supreme Court alleging that the "condemnation proceeding constituted an arbitrary taking of her property without due process of law." Id., at 169. The trial court had decided the case on the parties' cross-motions, on affidavits, and oral argument, and granted plaintiff's motion for appointment of condemnation commissioners. On review, the Appellate Division held that no genuine issue of material fact existed in the record because only plaintiff's experts had submitted affidavits detailing the

need, location and quality of the easement required. Defendant had failed to meet its burden of showing the existence of material facts - a trial error which the Court in Tidewater, supra, emphatically stated did not authorize a second appeal, "[o]therwise every cause in which nothing more is really at stake than a claim of mere trial error, for example, could be twisted to authorize a second appeal as of right." Id., at 342. The state supreme court dismissed the second appeal.

In 1972, the New Jersey Supreme Court again revisited the issue of second appeals in the case of Deerfield Estates, Inc. v. Tp. Of East Brunswick, 60 N.J. 115 (1972), wherein the plaintiff developer challenged a township requirement that developers introduce water mains at their own expense, which mains would subsequently become the property of the township.

The trial court ruled in favor of the defendant township, which decision was affirmed by the Appellate Divison, "[n]o mention of any alleged constitutional issue [having been] made before the trial judge or in the Appellate Division." Id., at 120. The developer appealed next to the state supreme court, claiming an unconstitutional "taking of private property without due process and just compensation." Id., at 121. A sole reference to violation of "Article I of the New Jersey Constitution and the Fifth Amendment of the United States Constitution," id. at 121, constituted the entirety of appellant's constitutional argument. However, despite a merely "colorable" question, the state supreme court decided to "treat it as if certification had been granted on our motion." Id., at 121.

In Piscataway Assoc., Inc. v. Township of Piscataway, 73 N.J. 546 (1977), a group of taxpayers appealed to the N.J. Supreme Court from an Appellate Division judgment "holding

that they had not established that the 1973 tax assessment on their property was unduly discriminatory and therefore invalid." Id., at 549. The Supreme Court decided that the second appeal was improper and in violation of the Tidewater guidelines that the issue "tendered is not frivolous and has not already been the subject of a conclusive judicial determination." Id., at 549. The court found that "[t]he issues here involve an analysis of a particular factual situation and application of those facts to statutory and constitutional criteria under established principles." Id., at 549. Again, however, instead of dismissing the appeal, the court found that the "general public importance of the questions presented warrants their being considered and accordingly have granted certification nunc pro tunc." Id., at 549-550. (Emphasis added). The Supreme Court reversed the judgment of the Appellate Division on the merits.

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Under applicable New Jersey case law, the constitutional question presented by Petitioner qualifies as "substantial." First, the question involves the statutory and "fundamental right" of an exceptant to examine a fiduciary under oath, without which right, the office of an exceptant is impossible to discharge with respect to challenging a fiduciary's account and proving surcharges. In Tidewater, supra, the New Jersey Supreme Court held that second appeals involving "fundamental rights" were warranted "because they are intrinsically of basic importance." Id., at 341.

Additionally, in Tidewater, supra, the court stated that the constitutional issue tendered cannot have already been "the subject of a conclusive judicial determination." Id., at 342; see also: Piscataway, supra, at 549. Petitioner meets that critical

standard. As previously stated, there is no case in this jurisdiction which presents a "due process" issue in connection with N.J.S.A. 3B:17-6, hence the constitutional issue presented qualifies as one of first impression.

The due process issue was raised, and briefed, by Petitioner before the Appellate Division of the Superior Court of New Jersey in his motion for reconsideration (Argument III: "The decision of the lower court denying appellant his right, under N.J.S.A. 3B:17-6, to examine the administrator C.T.A., under oath, and conduct discovery on the exceptions, under R. 4:10-2, violated appellant's due process rights under the Fourteenth Amendment to the United States Constitution"). The issue was also presented by Petitioner in his briefs filed in the New Jersey Supreme Court. This contrasts with the situation in Deerfield, supra, where although no mention of any alleged constitutional issue was made before the trial judge or in the Appellate Division," the supreme court granted certification nunc pro tunc. Id., at 120.

Finally, the due process issue presented herein does not compare with the situation in Windsor, supra, which question the supreme court deemed merely "colorable," because what essentially was involved was a trial "error" in failing to present evidence of material facts on a dispositive motion. In the within case, there was no opportunity to present evidence in the first place, because the probate judge absolutely refused to allow any evidence to be developed, either by discovery or examination of the fiduciary under oath.

An examination of the judgment entered in this estate shows the probate judge was selective in allowing Petitioner's challenges to the administrator's accounting, permitting challenges where the issue could be readily resolved on the

basis of the moving papers and argument thereon (e. g., lack of jurisdiction; insufficiency of process; insufficiency of service of process; allowance of the Article II inheritance to petitioner; and allowance of payment of $3,035.00 in funeral expenses to petitioner), while blocking the testimony necessary to establish exceptant's challenges to the fraud alleged in the two disbursement orders, and requests for surcharges, which would have required the administrator to take the stand and testify under oath on his decision to pay lawyers' bills, without contest; his refusal to deposit the Cordis check; the wrongful death suit on which the burden of proof shifted to the fiduciary; etc.).

N.J.S.A. 3B:17-6, however, allows no such selectivity. It permits an "under oath" examination of the fiduciary on the "truth or fairness of the account" – and not to any part thereof that is less than the whole.

## II. An exceptant to a fiduciary's accounting in New Jersey has a Due Process right under the Fourteenth Amendment to the United States Constitution to examine the fiduciary under oath and take discovery on the exceptions.

The Fourteenth Amendment to the United States Constitution states that: "[n]o state * * * shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is well-established by the Supreme Court that the federal guarantee of due process extends to a state's judiciary, Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930), and that the Fourteenth Amendment can be invoked if a state deprives any person or denied enforcement of a right guaranteed. Rice v. Sioux Memorial Park Cemetery, 349 U.S. 70 (1955).

The due process clause of the Fourteenth Amendment not only requires notice and an opportunity to be heard before an impartial tribunal but also provides the right to confront and cross-examine witnesses prior to the deprivation of a life, liberty or property interest. Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970). The due process right to a full hearing includes the right to introduce evidence and have judicial findings based on it. Baltimore & O. R. Co. v. U. S., 298 U.S. 349 (1936). See also: Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U.S. 510 (1912).

A state violates due process of law when it fails to follow procedural steps it has adopted for proceedings held before it. Whiteside v. Kay, 446 F.Supp. 716 (D.C. La., 1978). Implicit in the concept of due process are elements of decency and fair play. Galvin v. Press, 347 U.S. 522, (1954), reh. den. 348 U.S. 852 (1954). " '[D]ue process of law' means, in the due course of legal proceedings according to the rules and forms which have been established for the protection of private rights..." Sinclair v. Sinclair, 196 Tenn. 538, 268 S.W.2d 573, 575 (1954). Procedural due process is required if there has been a taking or deprivation of a constitutionally-protected interest. Chrysler Corp. v. Fedders Corp., 670 F.2d 1316 (C.A. 3, 1982). It seeks to ensure accurate determination of decisional facts. C.P.M. v. D'Ilio, 916 F.Supp. 415 (D. N.J., 1996). In examining a claim of procedural due process, the court first decides whether a liberty or property interest has been interfered with by the state, and, second, whether procedures attendant upon that deprivation are constitutionally sufficient. Petitioner possesses the requisite property interest for constitutional purposes due to his inheritance of $2,737.72 under Article II of his mother's will, which sum is less than the $6,408.80, excluding interest, he was originally entitled to. (See: Statement of the Case, infra, p. 9).

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The general rule with respect to examination of a fiduciary is that "an executor or administrator may be examined on oath as to any matter relating to his account, and it has been broadly stated that a personal representative may be examined for any purpose." 34 C.J.S. Executors and Administrators § 860 at 646 (2000). The right to examine is "independent and exclusive of the right to the ordinary examination before trial; it exists only in favor of an interested person, and must be exercised prior to final decree on accounting proceedings." Id., at 647. (Emphasis added).

In New Jersey, an exceptant's right to examine a fiduciary under oath is statutory in origin and follows the general rule. N.J.S.A. 3B:17-6 codifies that right:

> "On exceptions to an account of a fiduciary, the court or any party interested therein may examine the accountant, on oath, concerning the truth and fairness of the account."

Id. (Emphasis added).

N.J.S.A. 3B: 17-6 "provides that the court 'may' do the examining. It was once held that the court is required to do the examining [citations omitted]. But today the court does not examine the accountant any more than it examines any witness in any other action." Clapp, supra, § 1467 at 585, Note 3.

The former practice in New Jersey, wherein the court did the examining, was codified in the Revised Statutes of New Jersey (1937), which stated, in pertinent part:

> If a person interested in the settlement of the account of a fiduciary *** excepts thereto, the court shall hear proofs and allegations at a time appointed *** The court to which an account is reported for allowance *** may, at the instance of a party interested therein or by their own proper authority, examine the accountant, on oath, concerning the truth and fairness of the account.

R. S. 3:10-16. In 1951, the New Jersey Legislature repealed Title 3 of the Revised Statutes of 1937, as amended and supplemented, and enacted N.J.S.A. 3A:9-7, which, for the first time, gave the right of examination to an interested party, in addition to the court:

> On exceptions to an account of a fiduciary, the court or any party interested therein may examine the account, on oath, concerning the truth or fairness of the account.

Id. (Emphasis added) The present statute, N.J.S.A. 3B:17-6, enacted in 1981 (effective May 1, 1982), is identical in wording to its predecessor statute, N.J.S.A. 3A:9-7.

Consequently, the statutory right of examination possessed by a "party interested" arises upon the filing of exceptions to the account of a fiduciary. The right is separate and apart from the court's right of examination and does not depend on court discretion.

This statutory right of examination, which Petitioner attempted to exercise before the probate court, in order to contest the allowance of the two orders of disbursement and liability for surcharges, was brutally eliminated by the court:

"MR. CONNOR: I have not examined him under oath, which is my right.

THE COURT: And you are not going to."

(Appendix N, p. 36a).

The probate court's action, in preventing the examination of the Administrator, C.T.A., under oath, thereby immunized this fiduciary from liability for his actions in this estate: 1) his absolute failure to defend the estate he claimed to represent against $51,050.00 in attorneys' liens asserted against decedent's $58,428.02 trust fund; 2) his failure to intervene and prosecute decedent's wrongful death suit, Connor v. Sachs, which the Cordis litigation proved to be meritorious; 3) his refusal to deposit the $3,359.42 proceeds from decedent's Cordis litigation; and 4) his attempt to deprive Petitioner of his inheritance under Article II of his mother's last will and testament -- to mention but a few of his well-documented transgressions.

In New Jersey, "[t]he office of an exception generally is to challenge an account either on the ground that an accountant is not entitled, in whole or in part, to an allowance claimed by him; or on the ground that he has failed to charge himself with an asset..." 8 Clapp, New Jersey Practice, Wills and Administration §1465 at 579 (2000).

That a full evidenciary hearing is required when exceptions are filed to a fiduciary's account is well-established by precedent in New Jersey. As long ago as 1836, it was held that: "[t]he Orphans' Court had a right to examine the accountants, or either of them, under oath, touching the truth and fainess of the account. Rev. Laws, Section 786.31." Conover's Ex'rs. v.

Conover, 15 N.J.L. 420 (N.J. Sup. Ct., 1836). The current practice in the state is summarized accordingly:

> In the usual action on exceptions, the exceptant first calls the accountant to the stand, he has the privilege then of obtaining full discovery from the accountant, not only with respect to the exceptions, but in the discretion of the court, with respect to all matters proposed to be settled by the account * * * the exceptant may proceed as though he were cross-examining a witness.

Clapp, supra, at 586. (Emphasis added).

The general rule is that the burden of proof with respect to an attack upon a fiduciary's account rests upon the exceptant. In re Schlosser, 119 N.J. Eq. 488 (E. & A., 1935). Furthermore, the exceptant has the burden of proving that the accountant should be surcharged. In re Beale, 13 N.J. Eq. 222 (App. Div., 1935); In re Oliver's Estate, 3 N.J. Misc. 453 (1925). However, the burden of proof as to all allowances falls on the accountant. In re Atkinson's Estate, 86 N.J. Eq. 173 (E. & A., 1916). Of particular relevance to this estate, wherein the Administrator C.T.A. declined to intervene in decedent's wrongful death suit of Connor v. Sachs, supra, is the rule that when "a fiduciary knows of property or a chose in action belonging to the estate and makes no attempt to recover it, claiming that it is of no value or uncollectible. In such a case, the burden rests upon him to show that such an endeavor would have been of no avail." Clapp, § 1469 at 588. (Emphasis added). Where a personal representative fails to satisfy that burden, "the court may determine what should have been recovered by the representative in the exercise of good faith and reasonable care." Id., at 580. Additionally, the New Jersey Supreme Court

has unequivocally affirmed the wide latitude an exceptant is allowed on examination of a fiduciary: "[w]henever the fiduciary relationship exists sound public policy calls for the most searching inquiry into the conduct of the fiduciary and he should not be shielded from such an inquiry by the rules applicable to ordinary actions at law." In re Perrone, 5 N.J. 514, 525-526 (1950). (Emphasis added).

Consequently, N.J.S.A. 3B:17-6 and R. 4:10-2, and the above-cited precedents, practice and authorities establish an exceptant's right in New Jersey not only to take discovery on his exceptions but also to examine the fiduciary "under oath" on his accounting. Without these statutory and procedural safeguards, the office of an exceptant would be rendered a nullity in this jurisdiction, quickly opening the door to corruption. The denial of these rights, as occurred in the 1997 hearing in this estate, when the trial court refused to permit petitioner to examine the Administrator C.T.A., under oath, and suppressed his document requests, suffice to establish a severe denial of procedural due process to Petitioner under the Fourteenth Amendment, because, otherwise, an exceptant's objections and requests for surcharges cannot be proven.

* * * * * * * *

In a similar case, In re Bloomer, 37 N.J. Super. 85 (App. Div., 1955), a judgment of the Monmouth County Court, Probate Division, was remanded for rehearing on the matter of an allowed $18,000 counsel fee that was excepted to by decedent's widow, who contended, in her attorney's affidavit, filed immediately before the hearing, that the allowed fee should not exceed $6,000. At the hearing, "[t]he trial judge indicated that it would be impossible for him to digest the contents of the papers during the hearing, but nevertheless he permitted oral

argument to proceed." Id., at 88. However, no evidence had been taken. No one had testified under oath. At the end of the hearing, the court approved the full amount requested - $18,000. In remanding the action, the Appellate Division stated:

> A contested proceeding involving a claim for $18,000 and objections thereto by an interested party to the extend of $12,000 of the amount claimed, is certainly of sufficient importance and significance to the objecting party to call for its determination by the trial court in a manner which assures the giving of full judicial consideration and deliberation to the contentions made.

Id., at 93. (Emphasis added). Additionally, the Appellate Division required that "[t]he County Court should find the facts specially and state separately its conclusions of law there, pursuant to R.R. 4:53-1. Such procedure is directed 'in every contested action tried upon the facts without a jury.' " Id., at 93.

This is essentially the same situation as occurred in the within estate, where the trial court permitted only oral argument on petitioner's exceptions, which included enumerated requests for surcharges totally $46,291.51. No evidenciary record encompassing under oath testimony and examination of the administrator C.T.A. was allowed to be developed by the probate court in this estate.

As in Bloomer, supra, there are ample grounds to require a full, evidenciary hearing in this estate, particularly with respect to: petitioner's Objections IV - VIII that the 1984 and 1985 orders (which disbursed $51,015 from decedent's $58,428 trust

fund to a group of attorneys) were the result of "fraudulent procurement" on the part of the Administrator C.T.A.; the confinement of Petitioner to the status of a "legatee" – instead of a party – at the November 16, 1983 liens hearing (Appendix M, pp. 30a); the total failure of the Administrator C.T.A., himself or through his attorney (Watson) to question a single attorney-witness during the liens hearing ("No questions. Your Honor"). (Appendix M, p. 31-34a); his failure to defend the estate at the hearing by not even inquiring about decedent's contracts with two attorneys-claimant, etc. These facts, without more, constitute more than a sufficient basis to require this administrator to testify under oath on petitioner's allegation that the two disbursement orders he secured were fraudulently procured. Absent such an evidenciary hearing, there was no factual predicate for the trial court to conclude that: "[t]here was * * * no fraudulent procurement of those judgments [sic]." (September 26, 1997 Transcript II, p. 25, 17-20).

Aside from the issue of "fraudulent procurement," the evidence available to the trial court, of record, demonstrated a high degree of mala fides on the part of the administrator. In his final account, he attempted to bypass Article II of decedent's will, under which petitioner inherited the ($6,408.80) proceeds of the judgment in Connor v. Flynn, and attempted to distribute $5,914.80 to certain contingent beneficiaries who did not take under the will (see: Statement of the Case, infra, p. 9), coincidentally also thereby voiding petitioner's inheritance of "right, title and interest" to Connor v. Flynn. The attempt was ultimately unsuccessful, nevertheless, the Administrator, C.T.A., did make the attempt.

Not to be omitted is the administrator's determined refusal to deposit the $3,359 Cordis proceeds check into the estate account. How can a fiduciary, in this or any other jurisdiction,

avoid interrogation on that type of conduct, which clearly demonstrates "bad faith"? (See: Affidavit of Jim Finberg, Esq., Appendix H, p. 16-19a). Perhaps Administrator Phillips was trying to avoid the inevitable conclusion that Connor v. Sachs was a meritorious suit, after all, and that he should have intervened in the case – and was therefor potentially liable for not doing so.

In any event, the aforesaid issues, extant in the pleadings and argument before the probate court, demonstrate the need for a remand for a hearing, in accordance with In re Bloomer, supra, under circumstances where Petitioner can conduct discovery on the exceptions and cross-examine the administrator under oath, in accordance with R. 4:10-2(a) and N.J.S.A. 3B:17-6.

In fact, the conduct of the Administrator C.T.A. on this estate is so extreme, for example, handing over some $51,000 of decedent's $58,000 trust fund without contest, while refusing to deposit the $3,359 Cordis check, that it fully merits "invok[ing] the inherent power of [the New Jersey Supreme Court] to exercise supervision over the performance of the fiduciary duties of court-appointed officers." In re Mild, 25 N.J. 467, 484 (1957).

**(A) Petitioner's rights to discovery on his exceptions and to cross-examine the fiduciary, under oath, were neither waived, nor otherwise lost, because of limitations or laches.**

On December 12, 1997, the probate court amended its judgment to find that petitioner "did waive his right to cross-examine the Administrator, C.T.A. on his decision to pay the attorneys' lien claims in their entirety, and not contest same, by

this refusal to participate in the hearing on November 16, 1983 in the matter of Connor v. Flynn/Flynn v. Connor, Docket Nos. C-2565-68/C-3138-68, which resulted in the judgment [sic] and order of disbursement, filed on February 29, 1984 and August 5, 1985, respectively." (Appendix F, p. 12a). (Emphasis added).

The United States Supreme Court has defined "waiver" as an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Furthermore, courts should "indulge every reasonable presumption against waiver," Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937), and should not "presume acquiescence in the loss of fundamental rights." Ohio Bell Tel. Co. v. Public Utilities Comm'n., 301 U.S. 292, 307 (1937).

The operative facts demonstrate that Petitioner never waived his right to cross-examine the Administrator, C.T.A., under oath, but refused to participate in the 1983 liens hearing as a legatee in order to preserve his rights as a party in Connor v. Flynn, which rights New Jersey courts consistently refused to recognize, although petitioner has now finally inherited those rights as the real party in interest in Connor v. Flynn under Article II of his mother's will.

The starting point in this inquiry is to distinguish between an estate accounting and a suit in equity, such as Connor v. Flynn. As succinctly stated by the New Jersey Supreme Court:

> An accounting is an administrative proceeding under judicial supervision rather than a suit between parties and every accounting is accordingly entitled in the matter of the estate involved rather than in the names of the executors and the exceptants.

In re Perrone, 5 N.J. 514, 525 (1950). (Emphasis added). After entry of the February 29, 1984 disbursement order, petitioner appealed on the ground, inter alia, that the trial court lacked subject matter jurisdiction because it had conducted basically a probate proceeding within the civil litigation of Connor v.Flynn. The Appellate Division disagreed, holding in Connor v. Flynn, Docket No. A-3187-83T3, in 1985, that: "[p]robate proceedings are not even remotely involved in the two proceedings below." (Appendix L, p. 28a).

Under the terms of the Appellate Division's 1977 remand decision in Connor v. Flynn, A-898-75, a plenary hearing on the matter of counsel fees was ordered. (See: Statement of the Case, infra, p. 4 ). Not an issue in the 1983 hearing was any inquiry into the decision-making process of the Administrator C.T.A. to pay those liens at their full, face amounts, without contest, which inquiry would per se have crossed the line into an administrative (probate) proceeding.

The fact of the matter is that Petitioner, as a "legatee" (which was the only status the court would accord petitioner at the liens hearing), possessed no legal standing to participate in Connor v. Flynn. "The conduct of suits belongs to the parties to them, and only they have the right to apply for orders and directions." Collins v. Kiederling, 87 N.J. Eq. 12, 14 (Ch., 1916). (Emphasis added). Consequently, petitioner's right to substitute as a party in Connor v. Flynn, was the only right petitioner could have waived by participating in the 1983 liens hearing as a "legatee." No other rights existed to waive, because the right to cross-examine a fiduciary under oath, on an estate accounting, only arises under the laws of New Jersey dealing with the administration of estates, N.J.S.A. 3B-17-6 in particular, which allows cross-examination of a fiduciary only upon the filing of "exceptions to an account of a fiduciary..."

Id. Accountings of a fiduciary do not get filed in General Equity, nor can exceptions be filed in inter-partes litigation such as Connor v. Flynn.

Consequently, the (probate) rights that accrue to Petitioner, under N.J.S.A. 3B:17-6 and R. 4:10-2(a), were not involved in the 1983 liens hearing in Connor v. Flynn and were therefor not subject to waiver. (No existent rights: no waiver). In his Final Account, the Administrator C.T.A. asks allowance for the payments contained in the 2 orders – an issue identical to that in Hurlbut v. Hutton, 44 N.J. Eq. 302 (Ch., 1888), wherein the exceptants attacked a judgment which the executors allowed to be recovered against the estate, the exceptants alleging fraudulent procurement. The court held that, although the exceptions were insufficiently drawn, nevertheless:

> There can be no objection to an inquiry, under proper exception, as to the good faith of the executors to the estate of Mr. Hutton, touching this judgment. If it was the product of bad faith on their part, they cannot be allowed for its payment. This is not an inquiry as to the validity of the judgment between Mr. Landon and the estate. The judgment has now been paid, and the executors ask credit for their payment of it. If the judgment was not the product of their bad faith to the estate, they should have the desired credit; but if it was concocted by them, or with their assent, for the purpose of charging the estate unduly, they should not be allowed the credit they ask.

Id., at 307-308. (Emphasis added).

The remand remedy in Hurlbut, supra, is the proper remedy here: a remand for the determination of the issue of whether the two disbursement orders were fraudulently procured and are a product of the Administrator C.T.A.'s "bad faith" to this estate. As stated by the New Jersey Supreme Court in In re Perrone, supra: "[w]herever the fiduciary relationship exists sound public policy calls for the most searching inquiry into the conduct of the fiduciary and he should not be shielded from such an inquiry by the rules applicable to ordinary actions at law." Id., at 525-526. (Emphasis added).

In its decision from the bench, the court stated: "I am not going to allow 20 years after these initial cross-litigation[s] nor after your mother's death, 20 years later, that the administrator CTA be surcharged because he didn't fight against the liens –" (September 26, 1997 Transcript II, pp. 20-11 to 21-4). However, as stated by the Appellate Division in In re Ackerman, 23 N.J. Super. 316 (App. Div., 1952):

> The statute of limitations does not constituted a bar to the enforcement of surcharge for overpayment [citations omitted]; nor does laches, in the absence of a showing that the fiduciary changed his position or was prejudiced, by the delay in seeking to surcharge him.

Id., at 323. (Emphasis added). In Ackerman, supra, the substituted administrator, in 1951, brought a proceeding to surcharge the original administrator for overpayments he had made to certain distributees in 1936 – 15 years earlier. The Appellate Division held that even the decree allowing the original representative's account constituted no protection to the representative and did not operate to bar the subsequent proceeding to surcharge. In Huston v. Roe, 78 N.J. Eq. 215

(Prerog. Ct., 1910), exceptions were allowed to the final account of an administrator where the account was filed nearly 20 years after the administrator's appointment.

In the within estate, the 2 disbursement orders objected to date from February 29, 1984 and August 5, 1985 – a lapse of time of 13 years prior to the 1997 filing of the Administrator, C.T.A.'s final account – and only 10 years, had the Administrator C.T.A. timely complied with the November 4, 1994 order of the Honorable Alvin Weiss, A.J.S.C. to "file a complaint and order to show cause pursuant to R. 4:87." (Appendix G , pp. 14-15a).

There was no showing by the Administrator, C.T.A. that limitations is available to him or even, for that matter, a laches defense. Petitioner could not have filed his exceptions any earlier than he did, on September 4, 1997, when the Administrator C.T.A. finally filed his accounting. Consequently, neither limitations nor laches is a bar to prosecution of petitioner's exceptions and requests to surcharge related to the issue of "fraudulent procurement" of the two disbursement orders.

In any event, those defenses could never apply to the much more recent conduct of the Administrator C.T.A., including: his failure to intervene in decedent's wrongful death suit of Connor v. Sachs; his refusal to deposit the Cordis proceeds check into the estate account, absent a court order; and his attempt to eliminate petitioner's inheritance under Article II of his mother's will, to mention but a few. This fiduciary has a lot to answer for.

If, in New Jersey, "sound public policy calls for the most searching inquiry into the conduct of the fiduciary [who] should not be shielded from such an inquiry by the rules

applicable to ordinary actions at law," In re Perrone, supra, then Administrator C.T.A. Phillips must be examined under oath by the undersigned Petitioner, the *interested party* who timely filed exceptions and requests for surcharges to the administrator's final account, under N.J.S.A. 3B:17-6.

## CONCLUSION

For reasons aforesaid, Petitioner prays that the Supreme Court grant the within petition for certiorari and issue its writ of certiorari in this case.

Respectfully submitted,

/s/ John R. Connor
John R. Connor,
Petitioner pro se

Dated: June 6, 1996

# APPENDIX

**APPENDIX "A"**

SUPREME COURT OF NEW JERSEY
A-2 September Term 1999
48,204
(Filed: January 24, 2001)

IN THE MATTER OF
THE ESTATE OF MARY A. CONNOR

**ORDER**

(JOHN R. CONNOR -Appellant)

This matter having come before the Court on an appeal as of right pursuant to Rule 2:2-1(a)(1) , and the Court having determined that the matter does not present a substantial constitutional question withing the meaning of the Rule or applicable caselaw;

It is ORDERED that the within appeal is dismissed.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this day of 23rd of January, 2001.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT
OF NEW JERSEY

/s/ Stephen W. Townsend
CLERK OF THE SUPREME
COURT

**APPENDIX "B"**
(Filed: March 8, 2001)

SUPREME COURT OF NEW JERSEY
M-786 September Term 2000
48,204

IN THE MATTER OF THE ESTATE
OF MARY A. CONNOR

**ORDER**

This matter having been duly presented to the Court, it is

ORDERED that the motion of John R. Connor for reconsideration of the order dismissing the notice of appeal is denied.

WITNESS, The Honorable Deborah T. Poritz , Chief Justice, at Trenton, this 7th day of March, 2001.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.
/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

**APPENDIX "C"**
(Filed: May 19, 1999)

ORDER ON MOTION

I/M/O THE ESTATE OF
MARY A. CONNOR

SUPREME COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002666-97T5
MOTION NO. M-005754-98
BEFORE PART: D
JUDGE(S): CONLEY
LEFELT

MOTION FILED: MAY 07, 1999 BY: JOHN R. CONNOR
ANSWER(S) FILED:

SUBMITTED TO COURT: MAY 17, 1999

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 17th DAY OF May, 1999, HEREBY ORDERED AS FOLLOWS:

| | GRANTED | DENIED | OTHER |
|---|---|---|---|
| MOTION BY APPELLANT - FOR RECONSIDERATION | ( ) | (X) | (X) |

SUPPLEMENTAL:

We fully understood in our opinion that the November 5, 1997 order appealed from was that order as amended on December 12, 1997.

FOR THE COURT:

/s/ Ermine L. Conley
ERMINIE L. CONLEY, P.J.A.D.

I hereby certify that the
foregoing is a true copy of the
original on file in my office
/s/ R.E. Emille Cox, Clerk

**APPENDIX "D"**
(Filed: April 26, 1999)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2666-97T5

In the matter of

THE ESTATE OF MARY A. CONNOR,

Deceased.

---

Argued April 14, 1999 - Decided April 26, 1999

Before Judges Conley and Lefelt.

On appeal from Superior Court of New Jersey,
Chancery Division, Probate Part, Essex County

John R. Connor, appellant, argued the cause pro se.

Respondent Estate of Mary A. Connor did not file
a brief.

PER CURIAM:

Mary A. Connor died in 1977 and it has taken over 20 years to settle her estate. John Connor, son and heir under Mary

Connor's Will appeals from Judge Rosemary Higgins-Cass' November 5, 1997 judgment which settled the Administrator C.T.A.'s final estate account. Connor claims Judge Higgins-Cass erred because she did not allow him, under N.J.S.A. 3B:17-6, to take discovery and examine the Administrator under oath about why he did not defend against placement of various attorney liens, which were approved by court order in 1983.

After carefully reviewing and considering Connor's brief, oral argument and the complete record submitted in this matter, we affirm on the basis of Judge Higgins-Cass' decision.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.
/s/ R.E. Emille Cox, Clerk

**APPENDIX "E"**
(Filed: November 5, 1997)
(Partial)

John R. Connor, Exceptant Pro se
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: PROBATE PART
COUNTY OF ESSEX
DOCKET NO. P-392-77/12,923-J

In the matter of:

| | | |
|---|---|---|
| THE ESTATE OF MARY A. CONNOR, | : | JUDGMENT ALLOWING ACCOUNT AND ADJUDICATING UPON EXCEPTIONS |
| Deceased. | : | |

---

This matter being opened to the court on September 12, 1997, the Honorable Rosemary Higgins-Cass, presiding, by Lucas E. Phillips, Jr., Esq., Administrator, CTA pro se for the Estate of Mary A. Connor, Deceased, and in the presence of John R. Connor, Exceptant pro se (no appearance for the Estate of Thomas Boyd Connor), the Administrator CTA seeking settlement of his Second and Final Account on Order to Show Cause under R. 4:83; and it further appearing to the court that the administrator filed an accounting to this court on July 18, 1997 to which twelve (12) written exceptions were filed; and the court having held hearings on the exceptions on September 12, 1997 and September 26, 1997; and the court having consid-

ered the pleadings and the law in the case, and having heard the argument of the parties thereon, but declining Exceptant's request to take the administrator's testimony under oath in open court, and good cause having been shown;

It is on this 5th day of November, 1997:

* * * * * *

ORDERED and ADJUDGED that the fourth exception taken to the payment of $3,696.00 to the firm of Keane, Brady & Hanlon, be and the same is hereby overruled, based upon the Order of Disbursement of the Hon. Paul B. Thompson, J.S.C., filed February 29, 1984, in the matter of Connor v. Flynn/Flynn v. Connor, Docket Nos. C-2565-68 & C-3138-68 (Superior Court of New Jersey, Chancery Division: Essex County); and it is further,

ORDERED and ADJUDGED that the fifth exception taken to the payments of $22,996.44 and $1,016.96 to Fred Blackwell, Esq., be and the same is hereby overruled based, respectively on the Order of Disbursement filed February 29, 1984, supra, and the Order of the Hon. Paul B. Thompson, filed August 5, 1985 * * * ; and it is further,

ORDERED and ADJUDGED that the sixth exception taken to the payment of $16,211.34 to the firm of Hannoch, Weisman P.A., be and the same is hereby overruled, based on the Order of Disbursement, filed February 29, 1984, supra; and it is further,

ORDERED and ADJUDGED that the seventh exception taken to the payment of $1,000.00 to the firm of Belson and Carlin be and the same is hereby overruled, based upon the

Order of Disbursement, filed February 29, 1984, supra; and it is further,

ORDERED and ADJUDGED that the eighth exception taken to the payment of $6,094.26 to George Warren, Esq., Administrator, Estate of Mary A. Connor, be and the same is hereby overruled, based on the Order of Disbursement * * * ; and it is further,

ORDERED and ADJUDGED that the ninth exception taken to the proposed distribution of $5,914.80 to the beneficiaries is allowed on the grounds that, under Art. IV(b) and (c) of decedent Mary A. Connor's Last Will and Testament, the listed beneficiaries are contingent beneficiaries, who would only take under the will in the event decedent's husband, Thomas Boyd Connor, had predeceased Mary A. Connor and because, under Art. II, Exceptant John R. Connor is the recipient of a specific bequest, i.e., the proceeds of the judgment in Connor v. Flynn, A-2853-74 (C-2565-68), which sum amounted to $6,408.80 according to the final judgment in that suit, filed on March 7, 1975, the final distribution to Exceptant, after payment of decedent's debts, administration expenses and fees being the sum of $2,737.72; and it is further,

ORDERED and ADJUDGED that the tenth exception taken to the omission from the administrator's final account, of decedent's funeral expenses in the amount of $3,035.10 is allowed, and that the Administrator C.T.A. is hereby ordered to pay said sum to Exceptant as creditor with a claim of first priority under N.J.S.A. 3B:22(a); and it is further,

ORDERED and ADJUDGED that the eleventh exception to payments to the Administrator CTA of $2,971.51 in corpus commissions and $1,500.00 in attorney fees and $1,000.00 to

John H. Watson, Jr., Esq., for attorney fees, or a total of $5,471.51 is hereby overruled; and it is further,

ORDERED and ADJUDGED that the twelfth exception taken by Exceptant to the allegedly fraudulent predicate underlying the appointment of Administrator Phillips, contained in the Appellate Division's 1980 decision in The Estate of Mary A. Connor, Deceased, A-1889-79, is overruled on the ground that this court has no power to overturn a decision of a higher court; and it is further,

********

ORDERED and ADJUDGED that all surcharges requested by Exceptant in Exceptions #4 through #11 are hereby denied; and it is further,

ORDERED and ADJUDGED that Exceptant shall not be allowed to conduct discovery on his Exceptions and that Exceptant's First Document Requests (#1 & 2) to the Administrator, CTA, served on September 17, 1997, are hereby suppressed; and it is further,

ORDERED and ADJUDGED that Exceptant's request to cross-examine the Administrator, C.T.A., on his final account, dated July 18, 1997, under oath, in open court, is denied; and it is further,

ORDERED and ADJUDGED that, except as otherwise hereinabove ordered and adjudicated, the Revised Final Account of the Administrator, C.T.A., of the Estate of Mary A. Connor, Deceased, dated October 8, 1997, including commissions of $2971.51 to Lucas Phillips, Esq., and attorneys' fees to John Watson, Esq. of $1000 and to Lucas Phillips of $1500,

together with disbursements of $565.44, an audit fee of $100.00 to the Surrogate of Essex County, is hereby allowed; and it is further,

ORDERED and ADJUDGED that, upon making final distribution, Lucas E. Phillips, Jr., is hereby discharged as Administrator, C.T.A. of the Estate of Mary A. Connor; and it is finally,

ORDERED and DIRECTED that a filed copy of this judgment shall be served on all parties within seven (7) days of the date of this judgment.

/s/ Rosemary Higgins Cass
ROSEMARY HIGGINS CASS, J.S.C.

**APPENDIX "F"**
(Filed: December 12, 1997)

John R. Connor, Pro se
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: PROBATE PART
ESSEX COUNTY
DOCKET NOS. P-392-77/12,923-J

In the matter of :

THE ESTATE OF MARY A. CONNOR, : Civil Action

**ORDER**
To Amend Judgment
Deceased.
_____ :

The matter having been opened to the Court by John R. Connor, Exceptant pro se, and the court having considered the moving papers, there being no response thereto, and good cause appearing;

It is on this 12th day of December, 1997,

ORDERED and DIRECTED that:

1) Exceptant's motion to amend the judgment entered in this matter on November 5, 1997, is hereby granted; and it is further,

ORDERED and ADJUDGED that:

2) the said judgment, entered November 5, 1997, is hereby amended to incorporate the court's conclusion of law that Exceptant (did) waive his right to cross-examine the Administrator, C.T.A., on his decision to pay the attorneys' lien claims in their entirety, and not contest same, by Exceptant's refusal to participate in the hearing conducted on November 16, 1983 in the matter Connor v. Flynn, Flynn v. Connor, Docket Nos. C-2565-68/3138-68, which resulted in the judgment and order of disbursement, filed on February 29, 1984 and August 5, 1985, respectively.

/s/ Rosemary Higgins Cass
J.S.C.

**Appendix "G"**
(Filed: November 4, 1994)

LUCAS E. PHILLIPS, JR., ESQ.
7 Glenwood Avenue, Suite 304
East Orange, New Jersey 07017
(201) 675-0886

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: PROBATE PART
ESSEX COUNTY

| | |
|---|---|
| In the Matter of: | : |
| | Civil Action |
| The Estate of Mary A. Conner, Deceased. | Docket No. P-392-77 |
| | : **ORDER** |

This matter having been opened to the Court by John R. Connor, Pro se and John R. Connor, Pro se appearing, and Lucas E. Phillips, Jr., Administrator, C.T.A., appearing, and filing a First and Final Account of his Administration for the Estate of Mary A. Connor, deceased, and seeking settlement of same, and for good cause shown;

It is on this 4th day of November, 1994 ORDERED:

That the Administrator CTA file a complaint and order to show cause pursuant to R. 4:87 et seq. directed to all persons interested therein to Show Cause before the Honorable Alvin Weiss, A.J.S.C. at the Essex County Courts Building, Newark, New Jersey why an Order should not be entered as follows:

A) Allowing the settlement of the First and Final Account of Lucas E. Phillips, Jr., Administrator C.T.A. as stated.

B) Allowing John H. Watson, Jr., attorneys fees in the amount of $1,000.00 for services provided during the period of administration.

C) Allowing Lucas E. Phillips, Jr., Administrator C.T.A., a corpus commission of $2,837.12, and $360.96 as reimbursement for expenses incurred on behalf of the administration of said estate.

/s/ ALVIN WEISS, A.J.S.C.

**Appendix "H"**
(Filed: August 27, 1997)

**AFFIDAVIT**
**OF**
**JAMES M. FINBERG, ESQ.**

State of California )
) SS:
County of San Francisco )

Appeared before me, James M. Finberg, Esq. of full age who first being duly sworn upon his oath deposes and says that:

1. I am an attorney and partner at the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP.

2. I have personal knowledge of the facts herein stated and if called as a witness could and would testify competently thereto.

3. Lieff, Cabraser, Heimann & Bernstein, LLP was Class Counsel in the Cordis Pacemaker Litigation MDL 850 in which the Estate of Mary Connor was a claimant.

4. Claims were processed in the Cordis Pacemaker Litigtion MDL 850 in November 16, 1995 and checks were issued at that time.

5. A check in the amount of $3,359.92 was issued to the Estate of Mary A. Connor, c/o John Connor on November 16, 1995.

6. Throughout the distribution process I have personally directed Katherine Phipps to contact all class members with respect to the status of checks that were outstanding in the Settlement Fund.

7. Katherine Phipps notified me that Mr. Connor had been unsuccessful in persuading the Administrator of the Estate of Mary Connor to deposit the Settlement check. On October 31, 1996, I called Mr. Connor on the telephone and explained to him that pursuant to the Court's order, I was required to give the funds to charity if the Settlement check was not cashed by October 31, 1996.

8. Mr. Connor said that he had forwarded the Settlement Fund check drawn to the Estate of Mary Connor to the Estate Administrator, Lucas Phillips, by Federal Express many months before, with directions to deposit the check in the estate's account, but that Mr. Lucas had failed to do so.

9. On October 31, 1996, Mr. Connor and I jointly telephoned Mr. Lucas Phillips' office and we left a voice mail message stating that Mr. Phillips should contact me immediately, and that if Mr. Phillips did not deposit the check promptly, a stop payment would be applied and the proceeds would be sent to a charity as designated in the Court's Order. Mr. Phillips did not return my call or deposit the check.

10. On October 31, 1996, I obtained from the United States District Court for the Southern District of Ohio a brief extension with respect to Mr. Connor.

11. Approximately one week later, I called Mr. Phillips' office and left another message asking him to call me and warning that the funds would be given to charity if not

deposited. Again, Mr. Phillips did not return my call or deposit the check.

12. In December, 1996, when the check in Mr. Phillips' possession remained uncashed, I instructed the Claims Administrator to cancel the check and to issue a new check made out to the Estate of Mary Connor. I am today mailing that check to John Connor.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Affidavit is executed at San Francisco, California on this 20th day of December, 1996.

/s/ James M. Finberg
JAMES M. FINBERG, ESQ.

State of California )
) ss:
County of San Francisco )

On this 20th day of December, in the year 1996, before me, DEBORAH HOLM, a Notary Public, State of California, duly commissioned and sworn, personally appeared JAMES M. FINBERG, ESQ., proven to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.
/s/ Deborah Holm
NOTARY PUBLIC, STATE OF CALIFORNIA
My commission expires: 8/26/99

**Appendix "I"**
(Filed: April 28, 1997)

This order prepared by the
court for the convenience
of the parties.

| | | |
|---|---|---|
| | : | SUPERIOR COURT OF NEW JERSEY |
| In the Matter of | : | CHANCERY DIVISION: PROBATE PART |
| | : | ESSEX COUNTY |
| THE ESTATE OF MARY A. CONNOR, | : | DOCKET NO. 12,923-J |
| | | Civil Action |
| Deceased. | : | |
| | | **ORDER** |

The matter having been opened to the court by John R. Connor, pro se, and the court having considered the moving papers, responses thereto, and good cause appearing;

It is, on the 28th day of April, 1997,

ORDERED and DIRECTED that:

1. The funds in the possession of John R. Connor, to wit, the proceeds from the Cordis litigation, in the amount of $3,359.92, shall be forthwith delivered to the undersigned judge for deposit into checking account #053-003069-2, Broad National Bank, said account in the name of the Estate of Mary A. Connor, deceased; same shall await the further order of this

court upon completion of the accounting proceeding in this matter.

/s/ Rosemary Higgins Cass
Hon. Rosemary Higgins Cass, J.S.C.

A TRUE COPY
SURROGATE OF
ESSEX COUNTY

## Appendix "J"

LAST WILL AND TESTAMENT OF MARY A. CONNOR
(Probated and Filed: December 4, 1979)
(Partial)

I, MARY AGNES CONNOR, of the Township of Millburn, County of Essex and State of New Jersey, being of sound and disposing mind, memory and understanding do hereby make, publish and declare this to be my Last Will and Testament hereby revoking and making void any other Wills and Codicils by me heretofore made.

* * * * * *

SECOND: I give and bequeath any right, title and interest, including the proceeds, of the judgment in a pending lawsuit entitled Connor v. Flynn, Docket A-2853-74, in the Superior Court of New Jersey, to my son, John Richard Connor, absolutely and forever.

* * * * * *

FOURTH: If, however, my said husband shall predecease me or if we die simultaneously or under circumstances making it doubtful which of us died first, or if we die in a common disaster then and in that event I give, devise and bequeath the said residue of my estate as follows:

* * * * * *

(b) the sum of Four Hundred Ninety-nine ($499.00) Dollars unto each of my four grandchildren, Lorraine

Connor, Christine Connor, Heather Connor and Erin Connor;

(c) All the rest, residue and remainder unto my children, John Richard Connor, Robert William Connor and Carol Moken, in equal shares, per stirpes, absolutely and forever.

******

LASTLY: I nominate, constitute and appoint my son, John Richard Connor, Executor of this my Last Will and Testament to serve without bond...

******

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 13 day of April in the year of our Lord One Thousand Nine Hundred and Seventy-seven.

/s/ Mary Agnes Connor

******

SIGNED, SEALED, PUBLISHED AND DECLARED, by the above named MARY AGNES CONNOR, as and for her Last Will and Testament in the presence of us (all being present at the same time), we have hereunto subscribed our names as witnesses. And we do hereby certify that before signing our names hereto, this attestation clause was read over to us aloud and that the events herein specified and set forth took place as herein described.

Sandra K. Hocker 101 Fairview Ave., S. Orange, N.J.

K.C. Colstall 1 Depot Plaza, Maplewood, N.J.

We certify that this document
is a true copy of the original
which original is the will of
Mary Agnes Connor, consisting
of three pages.

/s/ Sueli S. Petry
Sueli S. Petry
A Notary Public of New Jersey
My Commission Expires Sept. 27, 1982

**Appendix "K"**
(Filed: September 16, 1994)

State of New Jersey
Department of the Treasury
Division of Taxation

August 24, 1987 In Reply Refer to
CN 249

50 Barrack Street
CN-269
Trenton, New Jersey 08646

Mr. John R. Connor
380 Wyoming Avenue
Millburn, N. J. 07041

Dear Mr. Connor:

Receipt is acknowledged of your letter of August 16, 1987.

This is to advise you that a completed Inheritance Tax Return has never been filed in the estate of Mary A. Connor, If you are a beneficiary of her estate, a copy of any return filed with us will [be] forwarded to you upon receipt.

Very respectfully,

/s/ Emil A. Petrecca
Emil A. Petrecca
Chief Auditor
Transfer Inheritance Tax

EAP/bd

**Appendix "L"**
(Filed: May 30, 1985)
(Partial)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3187-83T3

IN THE MATTER OF MARY A. CONNOR,
Individually, and as Executrix of
the Estate of Mary Ellen Flynn,

Plaintiff,

v.

EDWARD J. FLYNN,

Defendant.

---

EDWARD FLYNN and BERNICE FLYNN,

Plaintiffs,

v.

MARY CONNOR and THOMAS CONNOR,

Defendants.

---

Argued: March 25, 1985 – Decided: May 30, 1985

Before Judges King and Deighan

On appeal from the Superior Court, Chancery Division, Essex County.

John R. Connor argued the cause pro se. (Mr. Connor and Thomas B. Connor, pro se on the brief).

Fred Blackwell argued the cause pro se.

Mark J. Keane appeared on behalf of Keane and Brady but did not argue the cause.

PER CURIAM:

Appellants John R. Connor (Connor) and Thomas B. Connor appeal from an order entered February 29, 1984 allowing counsel fees and directing payment by the Clerk of the Superior Court from funds on deposit * * *

* * * * * * * *

We are satisfied that the issues of law raised by appellants are clearly without merit and we determine that an opinion would have no precedential value. R. 2:11-3(E)(1)(E). Nevertheless, we will succintly [sic] dispose of these issues which are basically that (1) the trial court lacked jurisdiction to award any fees because the proceedings were probate in nature...

* * * * * * * *

Probate proceedings are not even remotely involved in the two proceedings below * * * The only relation to probate is the fact that the administrator c.t.a. is a proper party to the proceedings as a representative of the Estate of Mary A. Connor. See Palko v. Palko, 73 N.J. 395, 398 (1977) * * * Lucas E. Phillips, as administrator, c.t.a. of the Estate of Mary A. Connor, was the only proper party to the proceedings.

* * * * * * * * *

Affirmed.

**Appendix "M"**
(Filed: June 16, 1998)
(Partial)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: ESSEX COUNTY
DOCKET NO. C-2565-68
DOCKET NO. C-3138-68

Essex County Courts Building
Newark, New Jersey 07102
November 16, 1983

In the matters of:

MARY A. CONNOR, Individually and as Executrix of the Estate of Mary Ellen Flynn,
Plaintiff,

vs.

EDWARD J. FLYNN,
Defendant.

STENOGRAPHIC RECORD

---

EDWARD FLYNN and BERNICE FLYNN,
Plaintiffs,

vs.

MARY A. CONNOR and THOMAS CONNOR,
Defendants.

PLENARY HEARING

---

MR. BLACKWELL: Judge Thompson, Fred Blackwell for myself and Mr. Holt and the Keane, Brady & Hanlon firm.

I too would like to join in the objection made by Mr. Watson to the characterization of Mr. Connor as appearing pro se and as executor. We take the position he is not a party to this proceeding.

THE COURT: All right. Whether he is a party or not I felt he should be notified and be here.

MR. BLACKWELL: We have no objection to his being here as an individual but he is not a party and appearing as a party, which is our position.

THE COURT: All right. Do you want to make your applications on the record?
[November 16, 1983 Transcript: Part I, pp. 3-4]

* * * * * * * *

MR. CONNOR: In any event I submit that I have rights as a party which includes the right to * * * cross-examine the applicants who are here this morning and furthermore that is a right that is, I allege, constitutionally mine.

THE COURT: Well, that is why your are here. What has denied you any rights? As a legatee, you, certainly, can be heard on fees which are coming out of your pocket...
[November 16, 1983 Transcript: Part I, p. 10]

* * * * * * * *

(The portion requested to be transcribed by Mr. Connor is completed and Mr. Connor left the courtroom).

CERTIFICATE

I, ALICE I. SABEL, Official Court Reporter and Certified Shorthand Reporter of the State of New Jersey, do certify the foregoing to be a true and accurate transcript of my stenographic notes taken at the above entitled proceeding.

Dated: March 9, 1984

/s/Alice I. Sabel
Alice I. Sabel

(Continued Partial Transcript)

MR. BLACKWELL: I would, also, suggest that Mr. Phillips has been in this proceeding a de facto party defendant and we would be suggesting that today that he be, technically, added as a substituted party defendant.

THE COURT: You mean Connor?

MR. BLACKWELL: No, Mr. Phillips.
-[November 16, 1983 Transcript: Part II, p. 4]

********

MR. BLACKWELL: I just wanted to give you the history of that fund in court and after 10 or 12 years I could say much more but I will stop and submit to any questioning.

THE COURT: Any questions?

MR. WATSON: I would just like the record to reflect Mr. Phillips is now in court.

THE COURT: What is the final amount you are seeking with interest to date, Mr. Blackwell?

MR. BLACKWELL: * * * The interest from that date until today, November 16, amounts to $12,312.01 for a total of $26,132,32.
[November 16, 1983 Transcript: Part II, p. 13]

* * * * * * * *

MR. HOLT: We claim a lien on this fund in court...

THE COURT: How much is the interest?

MR. HOLT: Approximately $1,982.22. The total claim would be $4,200.14. That is up to today.

THE COURT: All right. Any questions?

MR. WATSON: No questions, your Honor.

THE COURT: Who is next?
[November 16, 1983 Transcript: Part II, pp. 17-18]

* * * * * * * *

MR. LEVEE: Our attorneys' fees were $11,955.15 plus disbursements of $176.54. We have been paid $1,490.39. The balance due is $10,641,30. The interest on that amount through today since October 1975 is $7,780.68 for a total of $18,421.98.

THE COURT: All right.

MR. LEVEE: Does your Honor wish a copy of the Affidavit?

THE COURT: Yes.

[No questions asked by Mr. Watson of this witness]
[November 16, 1983 Transcript: Part II, pp. 18-19]

* * * * * * * * *

MR. SOLOWAY: Computing interest on that judgment, in accordance with the rules of court, as of today the total amount due to Belson and Carlin is $1,593.51. . .

* * * * * * * * *

THE COURT: Any questions?

MR. WATSON: No questions, your Honor.
[November 16, 1983 Transcript: Part II, p. 21]

* * * * * * * * *

MR. WATSON: We will submit an Order.

MR. BLACKWELL: In that Order, your Honor, I will state, again, we will provide for the joinder of Mr. Phillips as a party defendant.

THE COURT: All right.
[November 16, 1983 Transcript: Part II, p. 26]

* * * * * * * * *

## CERTIFICATE

I, ALICE I. SABEL, Official Court Reporter and Certified Shorthand Reporter of the State of New Jersey, Certificate No. 619, do hereby certify that the foregoing is a true and accurate transcript of the proceedings in the above-entitled matter.

DATED: June 11, 1984 /s/ Alice I.Sabel

**Appendix "N"**
(Filed: June 3, 1998)
(Partial)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - PROBATE
DOCKET NO. P-392-77
APP. DIV. NO. # _____

IN THE MATTER OF

| | | |
|---|---|---|
| THE ESTATE OF | ) | TRANSCRIPT |
| | ) | OF |
| MARY A. CONNOR, | ) | ORAL ARGUMENT |
| | ) | |
| DECEASED | ) | |

Place: Essex County Courthouse
50 W. Market Street
Newark, NJ 07102

Date: September 26, 1997

BEFORE:
THE HONORABLE ROSEMARY HIGGINS-CASS, J.S.C.

* * * * * *

APPEARANCES:

LUCAS PHILLIPS,
Administrator CTA, acting as counsel
For the estate of Mary A. Connor

JOHN CONNOR, PRO SE

Susan M. Cawley
G&L TRANSCRIPTION SERVICE
40 Evans Place
Pompton Plains, New Jersey 07444

Electronic Voice Recording
Recording Operator (unknown)

MR. CONNOR: I submit that the judgments for the purposes of discovery are – may be presumed valid. I submit that under Hurlbeit v. Hutton, that I'm entitled to go into his bad faith in fraudulently procuring the judgments [sic] without attacking those judgments [sic]. That's the holding of Hurlbeit v. Hutton, and that I quote to the Court in my letter. They are two entirely distinct issues.

THE COURT: Well, Mr. Connor, I've considered your application. I absolutely see no bad faith on Mr. Phillips' part as administrator CTA. He didn't procure the judgments, as such. These attorneys were seeking the judgments, the liens that they wanted in this matter.

MR. CONNOR: I have not examined him under oath, which is my right.

THE COURT: And you are not going to.

MR. CONNOR: Oh, Your Honor.

THE COURT: That may - -

MR. CONNOR: That is my right as an exceptant to put him on - -

THE COURT: No.

MR. CONNOR: - - the stand. That's reversible error,.

THE COURT: Well, it may well be and you have your right to appeal my decision...
[September 26, 1997 Transcript II, pp. 20-21]

********

MR. CONNOR: Yes, well, that's allowed under the Chancery Court in Hurlbeit v.Hutton. I'm entitled to prove that, to take discovery on that issue, and to conduct this - -

THE COURT: But whom do you - -

MR. CONNOR: - - deposition.

THE COURT: - - allege fraudulently obtained the judgments [sic]?

MR. CONNOR: Well, the administrator as the - - the chief fiduciary of this estate is legally responsible as a - -

THE COURT: I didn't ask you that.

MR. CONNOR: - - matter of law.

THE COURT: I asked you who do you think fraudulently obtained the judgment [sic]?

MR. CONNOR: Well, I would submit that Mr. Phillips and Mr. Watson and certainly the attorneys who submitted bills in [excess] of their contracts.

[September 26, 1997 Transcript II, p. 27]

* * * * * * * *

MR. CONNOR: - - this is my first opportunity to go at Mr. Phillips. I have never done this before and that is - -

THE COURT: You had an opportunity to - -

MR. CONNOR: - - the privilege of the - -

THE COURT: Excuse me.

MR. CONNOR: - - office of the exceptant.

THE COURT: You had an opportunity at the hearing before Judge Thompson to question, because he was allowing you to be present. You cho[]se to then absent yourself.
[September 26, 1997 Transcript II, p. 28]

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THE COURT: Excuse me. You had an opportunity, in fact Judge Thompson insisted that you be there. He thought as a legatee you had an absolute right to be there for that hearing. You choose, and I'll read you from the second - -

MR. CONNOR: I agree. You - - I agree.

THE COURT: - - transcript.

MR. CONNOR: I'll - -

THE COURT: All right.

MR. CONNOR: - - I'll submit I agree to it, but I think the Court is confusing the validity of the judgment [sic], which I'm accepting, with the manner in which they were procured by this administrator and his attorney. They are two entirely different issues. And the Hurlbeit case clearly delineates those issues. He is now responsible to this exceptant's - - exceptant for the manner of procurement of that judgment [sic] and he may be charged where he is found to have breached his fiduciary duties. That is the - - the decision [in] Hurlbeit v. Hutton, 44 Equity 303, Chancery Court 1888.

MR. PHILLIPS: May I make just a brief - -

THE COURT: Yes.

MR. PHILLIPS: point, Judge? As I indicated, I believe that this is Mr. Connor's attempt to re-litigate those issues that have been litigated concerning Judge Thompson's ruling in this matter...
[September 26, 1997 Transcript II, pp. 28-29].

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CERTIFICATION

I, Susan M. Cawley, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number 1, index number 3620 to 7462; tape number 2, index number from 0001 to 1872, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

/s/ Susan M. Cawley
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